DOCUMENT RESUME

ED 238 033 CS 504 275

AUTHOR Kleiman, Howard
TITLE Public Broadcasting and the Fairness Doctrine: A Continued Mandate?
PUB DATE [Feb 83]
NOTE 27p.; Paper presented at the Annual Meeting of the Western Speech Communication Association (Albuquerque, NM, February 19-22, 1983).
PUB TYPE Information Analyses (070) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Broadcast Industry; Court Litigation; *Ethics; Federal Legislation; Government Role; Mass Media; *Mass Media Effects; News Reporting; Propaganda
IDENTIFIERS *Fairness Doctrine; Federal Communications Commission; Media Role; *Public Broadcasting

ABSTRACT

The fairness doctrine states that broadcasters must devote a reasonable amount of time covering contrasting views of public issues. The debate over abolition of the doctrine has largely ignored the possibility that public broadcast stations licensed to government entities may be subject to political and constitutional pressures that would warrant a continued fairness mandate even in the wake of the doctrine's abolition for commercial broadcasters. Although network as well as public station news elicits charges of unfair coverage, commercial broadcasters' fairness obligations could be eliminated because (1) their congressional lobby is extremely effective, (2) the chairman of the Federal Communications Commission (FCC) favors eliminating the doctrine, and (3) elimination would be consistent with the deregulation philosophy of the current (Reagan) presidential administration. The rationale for requiring public stations to observe a balance requirement may be more philosophical than practical, since their audience is small and their impact predictably minimal. Nevertheless, a balance requirement prevents the use of a government mass media outlet to promulgate an official point of view and provides public stations with discretion in choosing spokespersons to offer contrasting viewpoints and deciding the form in which those views will be presented. (HTH)

**********
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
**********

ED238033

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

X This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

# PUBLIC BROADCASTING AND THE FAIRNESS DOCTRINE: A CONTINUED MANDATE?

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

Howard Kleiman

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

Dr. Howard Kleiman

Department of Communication Studies

University of Missouri-Kansas City

CS 504275

## ABSTRACT

Public stations licensed to government entities face political and constitutional constraints which may require a continued mandated adherence to the fairness doctrine, even in the wake of the doctrine's abolition for commercial broadcasters.

## Introduction

Among the various regulations promulgated by the Federal Communications Commission during the past 48 years, none has seemed to trouble broadcasters more than the fairness doctrine. The doctrine, which evolved from a number of rulings by the FCC and its predecessor, the Federal Radio Commission, requires that "the broadcaster must devote a reasonable percentate of . . . broadcast time to the coverage of public issues, and his coverage of these issues must be fair in the sense that it provided an opportunity for the presentation of contrasting points of view."[1] In 1959 Congress codified the fairness doctrine when it amended the political candidates equal opportunity section of the Communications Act.[2]

Recently, however, broadcasters and the FCC--at least in the person of Chairman Mark Fowler--have found themselves in agreement regarding the fairness doctrine. Chairman Fowler, reflecting the deregulatory philosophy of the president who appointed him, Ronald Reagan, has spoken out consistently and ardently for the abolition of the doctrine.

While broadcasters have clutched Chairman Fowler's words about the "unfairness doctrine" to their collective bosoms, his position has been criticized by a number of citizens' groups, along with some congressmen and former FCC staffers.[3] The resulting debate regarding the efficacy and constitutionality of the fairness doctrine has centered around such issues as: whether the scarcity of broadcast frequencies is still a viable rationale for the fairness doctrine in the face of the proliferation of new broadcast delivery technology; whether public feedback will be sufficient to deter broadcasters from using their stations exclusively as a forum for their personal social and political views; and whether a logical distinction can be made between the print media and the electronic media for the purposes of applying the fairness doctrine.

One issue that has been largely ignored during the often impassioned debate over the future of the fairness doctrine involves the singular position in which public broadcast stations licensed to government entitities--about two-thirds of

all public stations--find themselves. There is substantial evidence that these public stations may be subject to certain political and constitutional pressures which would require a continued mandated adherence to fairness obligations, even in the wake of the doctrine's abolition for commercial broadcasters. This paper reviews and evaluates those pressures.

## Overview of Public Broadcasting and the Fairness Doctrine

In developing and codifying the fairness doctrine, neither the FCC nor Congress differentiated between the responsibilities of commercial and noncommercial broadcasters under the doctrine. However, when Congress took up consideration of the Educational Television Facilities Act in 1961 and 1962, several legislators expressed uncertainity over whether the FCC's regulations, including the fairness doctrine, applied to noncommercial broadcasting. Their concern had been fostered by a section of the proposed legislation which, on its face, seemed to prevent federal officials from exercising any control over educational stations. Appearing at a House subcommittee hearing, FCC Chairman Newton Minow assured the legislators that the Facilities Act would not preclude his agency from exercising its "general regulatory powers" over noncommercial stations.[4]

Public broadcasters' responsibilities regarding the two elements of the fairness doctrine received close scrutiny during Congress' consideration of the 1967 Public Broadcasting Act. Part one of the doctrine--affirming a licensee's obligation to present controversial issues of public importance--was addressed by the Senate Commerce Committee's report on the legislation: "Particularly in the area of public affairs your committee feels that noncommercial broadcasting is uniquely fitted to offer in-depth coverage and analysis which will lead to a better informed and enlightened public."[5]

The part one requirement of the fairness doctrine was also tangentially referred to in the Senate-House conference report on the bill. The report stated that a proscription on public broadcasters' right to editorialize, inserted in the legislation at the insistence of the House, was "not intended to preclude balanced,

fair and objective presentations of controversial issues" by public stations.[6]

The House Interstate and Foreign Commerce Committee's report on the Public Broadcasting Act discussed the second element of the fairness doctrine, which mandated that broadcasters present contrasting opinions on controversial public issues. Although the House committee had heard a number of witnesses, including FCC Chairman Hyde, stress that the fairness doctrine clearly applied to public broadcasting, the bill reported out by the committee added a second layer of balance requirements on public broadcasting. Section 396(g)(1)(A) of the House bill required all programs funded by the newly created Corporation for Public Broadcasting dealing with controversial public issues to maintain strict adherence to "objectivity and balance".[7] The Senate, which had no specific fairness requirements in its version of the legislation, accepted the thrust of the House amendment, but modified it so it applied to multiple programs or series funded by CPB, rather than individual programs.

The FCC's first specific statement regarding a public licensee's fairness obligations came in 1970, when the Commission filed an amicus curiae brief in support of the University of Maine's challenge of a state statute prohibiting the Maine Educational Television Network from airing programs which promoted political and governmental activities. The Commission stated that fairness obligations apply "to all broadcasters without regard to whether theirs are commercial stations or noncommercial educational stations."[8] According to the Commission's brief, the legislative history of the Public Broadcasting Act clearly indicated that public stations should assume "the same affirmative burdens of political and other controversial issue coverage . . . placed on commercial licensees . . .."[9] The FCC added that public stations had demonstrated that they were "a most appropriate vehicle for this area of communications."[10]

The Maine Supreme Court's decision in favor of the University of Maine indicated that the FCC's comments regarding public broadcasters' responsibilities under part of the fairness doctrine had impressed the court. The court stated:

> We conclude that the "public interest" standard is as binding upon noncommercial licensees as it is upon those who operate for profit. The designation of their activities as "educational television broadcasting" would indeed be a misnomer if state law could effectively preclude them from presenting programs which are by their very nature essential to the educational process.[11]

The court also found no compelling state interest in protecting the public "from the dissemination of ideas as to which they may be called upon to make an informed choice."[12] Finally, the court rejected Maine's argument that its funding of the state's public television system justified attempts to control the system's programming.

The FCC further affirmed a public licensee's fairness obligations in two 1971 decisions. In Los Angeles United School District, the Commission's Review Board said Congress had opted to fund public broadcasting "because of the contribution which noncommercial educational stations can make in serving local needs, particularly in the public affairs area."[13] The decision also quoted extensively from the Commission's brief in the Maine case regarding public stations' duty to cover controversial public issues.

In its response to a question from public radio station WHPR regarding the proscription on editorializing, the FCC differentiated between the fairness doctrine and the Public Broadcasting Act's objectivity and balance provision:

> Section 396(g)(1)(A) applies to the Corporation for Public Broadcasting and not to individual licensess. However, noncommercial stations are governed by the fairness doctirne. They have a responsibility to inform the public on issues of public importance and afford reasonable opportunity for the expression of differing views . . . . The fairness doctrine does not require that all significant views on an issue be presented in one program or series of programs; but rather that the licensee meet his fairness

doctrine obligations in his overall programming.[14]

While the FCC's response to WHPR defined public stations' obligations under the fairness doctrine, the Commissions' limited remarks regarding Section 396(g)(1)(A) left the exact meaning of the statue in doubt. However, fairness complaints filed by the conservative media watchdog group Accuracy in Media in 1971 and 1972 against PBS elicited not only an FCC ruling on the enforcement of the provision, but also a judicial interpretation.

AIM's complaint focused on two PBS programs, the first dealing with sex education in the schools, and the second examining the American criminal justice system. AIM contended that both programs violated the fairness doctrine, and specifically charged that the latter program--"blatantly one-sided and propagandistic"--did not demonstrate the objectivity and balance mandated by Sections 396(g)(1)(A).[15]

In denying AIM's complaint, the FCC used the requirements of the fairness doctrine rather than Section 396(g)(1)(A) to determine that PBS's overall programming indicated a good faith effort to balance the opinions offered in the two programs. The Commission did admit uncertainity about its authority to enforce the objectivity and balance standard, since Section 396 of the Public Broadcasting Act stated that no agency or individual in the federal government could "exercise any direction, supervision, or control" over the CPB.[16] To clarify the seeming contradiction between Section 396(g)(1)(A) and 398, the FCC asked AIM and other "interested parties" to submit statements or briefs on the issue.[17]

After reviewing comments from AIM, CPB and PBS, the FCC denied AIM's petition for reconsideration. The Commission concluded that a careful reading of the legislative history and provisions of the Public Broadcasting Act indicated no government agency, including the FCC, had the authority to oversee CPB's activities. The FCC said such a determination would not preclude it from requiring individual public stations to comply with the fairness doctrine. The Commission added that since the doctrine was clearly applicable to public licensees, it was "inappropriate

for it to interpret the meaning of Section 396(g)(1)(A)."[18]

Dissatisfied with the FCC's ruling, AIM appealed the decision of the federal court of appeals for the District of Columbia. In October 1975, the court denied AIM's petition for review of the FCC's decision. The court agreed with the Commission's contention that the Public Broadcasting Act prevented it from enforcing Section 396 (g)(1)(A) against CPB. The court also held that since CPB was not engaged in broadcasting as defined by the Communication Act, the FCC had no statutory justification for exercising jurisdiction over the Corporation. Finally, the court supported the FCC's belief that it was authorized to apply its regulatory framework, including the fairness doctrine, to individual public stations.

Having decided that the FCC lacked the authority to enforce Section 396(g)(1)(A), the court concluded that the provision was merely "a guide to congressional oversight policy and a set of goals to which the directors of the Corporation for Public Broadcasting should aspire, (and) is not a substantive standard, legally enforceable by agency or court."[19] The court declined to rule on PBS's contention that the objectivity and balance provision represented "an enlargement of Government control over the content" of public broadcasters' public affairs programming.[20] However, the court did acknowledge that the requirements of Section 396(g)(1)(A) might threaten the "constitutional balance" established in the fairness doctrine and supported by the Supreme Court's decision in Red Lion v. FCC which upheld the consititionality of the fairness doctrine.[21]

The court's decision in the AIM case prompted Senator Orrin Hatch of Utah and Representative Robert Dornan of California to introduce a bill entitled the Public Broadcasting Fairness Act in their respective houses of Congress in 1977. The measure was designed to vest the FCC with the authority to enforce Section 396(g)(1)(A). In introducing the bill, Senator Hatch said the court's decision indicated the need for Congress to put "a few more teeth" into public broadcasting's

fairness obligations, and clarify the original legislative intent of the objectivity and balance standard. The Senator specifically cited the two programs which had led to AIM's original complaint as examples of the unbalanced programs funded by CPB.

The Public Broadcasting Fairness Act would not prevent CPB from funding programs which only presented one side of a controversial issue. However, if unbalanced programs were distributed to the local public stations, the FCC would be empowered to compel CPB to provide sufficient funding to the stations for the production of a program offering the other side of the issue.

The legislation generated some interest in both the House and Senate, but its sponsors were unable to get out of committee, where the measure ultimately died.

## Discussion

### The Politics of Fairness

The attempt to legislate an added fairness obligation on public broadcasting, albeit unsuccessful, is noteworthy as an example of the belief held by many Washington politicians that public stations are not due the same expressive freedom as their commercial brethren. That belief was strongly expressed during House debate over the 1967 Public Broadcasting Act, and manifested itself in the legislative proscription against editorializing, and the imposition of Section 396(g)(1)(A), the objectivity and balance requirement discussed earlier.

The House debate on the Public Broadcasting Act was replete with dire predictions that public broadcasting would be used as a domestic version of the United States Information Agency, to promulgate an "official" version of government activities. Two representatives, Brown of Ohio and McClure of Idaho, inserted excerpts from Orwell's 1984 in the Congressional Record to underscore their apprehensions about the possible perversion of public broadcasting's mission. Other legislators, such as Representative Joelson of New Jersey, worried about becoming the target of editorials delivered by public stations. Joelson claimed that politicians

were "sitting ducks," and thus "the right of editorializing should be very, very carefully scrutinized."[22]

The insertion of Section 396(g)(1)(A) demonstrated that Congress believed publicly funded broadcasters had a particularly strong obligation to adhere to strict fairness standards in their news and public affairs programming. In the case of Representatives Brown, McClure and others, that belief was fostered by honestly held fears about the use of public broadcasting for propaganda purposes. Other legislators, typified by Representative Joelson, recognized the opportunity to prevent at least one segment of broadcasters from criticizing public officals, and were determined to take advantage of that power. Noticeably absent from much of the House debate was the expression of any faith in the ability of professional public broadcast journalists to ensure the integrity, autonomy and fairness of the system's news and public affairs programming.

Public officials distrust of public broadcast journalism reached its zenith during the Nixon administration. Mr. Nixon's hostility toward the press has been well documented, and obviously did not begin with public broadcasting, nor was it directed solely at that system. But the President and his advisers were expecially outraged at federally funded broadcasters whose reporting criticized the performance and policies of the executive branch. Within the first year of Mr. Nixon's White House tenure, a senior White House aide wrote "our position (is) that government funding of CPB should not be used for the creation of anti-Administration programming or for the support of program producing organizations which use other funds to create anti-Administration programs."[23]

The Nixon administration launched a vigorous campaign to deemphasize public televison journalism (public radio has drawn relatively little attention from government officials) through appointing individuals sympathetic to its goals to the CPB board, restricting the level of CPB's federal funding, purging liberal journalists from the system, and limiting the amount of air time devoted to news and public

affairs programming. The strategy also involved capitalizing on the inherent tensions within public broadcasting regarding the system's journalistic efforts. Many public broadcasters were clearly unenthusiastic about the system becoming deeply involved in news and public affairs programming. That lack of enthusiasm was further reinforced when the Nixon administration made it evident that increased levels of federal support were unlikely if public television did not limit its journalistic activities.

The final realization of the Nixon plan was prevented by a series of factors, including the emergence of the Watergate affair, and a surprising show of unity among public broadcasters following the President's veto of the 1972 CPB authorization bill. However, the legacy of the Nixon administration was a less aggressive and more centrist form of public television national journalism.

Since the passing of the Nixon administration, public officials have evinced a continuing--although less direct--interest in public broadcast journalism. Legislators have occasionally voiced concern over a particular program, such as the 1980 PBS documentary Death of a Princess, but except for the introduction of the Public Broadcasting Fairness Act, there has been no coordinated attempt to seriously restrict the noncommercial system's news and public affairs programming. However, a position paper written for the Republican Party's Study Committee during the first months of the Reagan administration indicated that complaints regarding the liberal bias of public broadcasting's public affairs offerings were by no means a thing of the past. The paper cited a group of PBS documentaries again including Death of a Princess, as examples of slanted programming, and maintained such programs "justifiably give rise to questions about the worth of federally subsidized broadcasting."[24]

The chronicling of the tensions between public officials and public broadcasting is not to suggest that commercial broadcasting has not frequently drawn the ire of the White House and Capitol Hill. Network news and documentary programming, in particular, continues to elicit denunciations from officials who

feel they have not received fair and balanced treatment. However, such incidents notwithstanding, it is conceivable that, for a number of reasons, Congress could be persuaded to eliminate commercial broadcasters' fairness obligations.

First, the effectiveness of commercial broadcasters' congressional lobby has been well documented. Senator Ernest Hollings of North Carolina conceded the power of the broadcast lobby after the Senate Commerce Committee defeated his proposal to apply the fairness doctrine to saccharin products. Hollings said his colleagues "vote anything that the local broadcasters want," and added, "rather than a chairman of a subcommittee, I felt like a foreman of a fixed grand jury."[25]

The influence of the broadcast lobby is also strengthened by the direct involvement of legislators in the broadcast industry. While the holdings of senators and representatives is not extensive in terms of absolute numbers--in the 95th Congress, six senators and ten representatives had an interest in a broadcast property--frequently those investments have been held by influential legislators such as Lyndon Johnson.

Much of the willingness of national legislators to give commercial broadcasters special attention is obviously due to their dependence on television and radio to reach their constituents, especially at election time. Thus broadcasters and Congress find themselves in a symbiotic relationship, which was accurately described by PBS journalist Robert MacNeil:

> Imagine the situation of a street peddler who sells old fashioned patent medicines. He needs a license to stay in business, and the city official who issues them is dubious about most of the peddler's wares. Yet it just happens that one product, a magic elixir, is the only thing that will cure the official's rheumatism and keep him in health. So the two coexist in a tense mutual interdependence, the peddler

getting his license, the official his magic elixir.[26]

Second, the lobbying of FCC Chairman Fowler may also be effective in convincing legislators to drop the fairness doctrine. While it is impossible to gauge the exact impact of his position, it is a safe assumption that, as the first FCC chairman to aggressively campaign for the abolition of the fairness doctrine, Mr. Fowler's influence is felt on Capitol Hill.

Finally, a move to drop fairness would also be consistent with the deregulatory philosophy of the Reagan administration. However, it must be noted that President Reagan has given conflicting signals regarding his position on the fairness doctrine. In early 1982, the President told an interviewer that there was "a valid reason" for the doctrine, and added he had "no quarrel with both sides being presented."[27] But in a letter to the 1982 National Association of Broadcasters convention, Mr. Reagan said broadcasters were entitled to the same journalistic lattitude as the print media, which has no statutory fairness obligations placed on it.[28]

The conditions which make it conceivable that Congress might drop the fairness doctrine for commercial broadcasting are largely inoperative vis-a-vis public broadcasting. Public stations' limited audience share means they can offer no "magical elixir" to "ailing" public officials. With public stations playing little part in the campaign process, at least for the majority of the American electorate, public officials have little motivation to seek the favor of the noncommercial system.

The small audience share of public broadcasting also guarantees that Congress could extend unequal treatment to public stations without facing a significant negative reaction from the public. This factor was underscored by the lack of public outcry during the Nixon administration's attempts to stifle public television's journalistic voice.

Also, a number of the influential legislators who championed public broadcasting during its creation and formative years, such as Senators Pastore and

Magnuson and Representatives MacDonald and VanDeerlin, no longer hold office. While public broadcasting retains some advocates in Congress, there are few legislators with the stature or influence of a Magnuson or Pastore, ready to vigorously defend the system's interests.

Legislators who look to the FCC for guidance in evaluating the merits of the fairness doctrine will find that Chairman Fowler has been unwilling to extend his campaign to drop the regulation to public broadcasting. In a recent law review article, Mr. Fowler suggested that public television and radio had a constitutional obligation to provide access to various points of view. According to the chairman, such a right of access would "not offend the first amendment rights of broadcasters as much as in the commercial sector, since the government funds the broadcasters in question."[29] Mr. Fowler's argument will be further examined in the final section of this paper.

The factor which most clearly works against public broadcasting in its attempt to retain parity with the commercial system is the longstanding belief on Capitol Hill and in the White House that there is ample justification for treating public stations as second class entities in terms of their expressive rights. As discussed earlier, that belief stems largely from a fear of the system being used as a government mouthpiece, along with the less noble sentiment regarding the detrimental impact an aggressive journalistic voice can have on one's political well-being. Also, the roots of dual treatment of commercial and public broadcasting can be traced to some legislators' view of the latter as merely a social program--the Public Broadcasting Act was indeed one small part of Lyndon Johnson's Great Society--rather than a journalistic medium with certain expressive rights.

The dual treatment philosophy took form in the editorializing proscription and the objectivity and balance standard contained in the Public Broadcasting Act. While the courts have voided the former on First Amendment grounds and modified the latter in the AIM case, it is conceivable that Congress would give

strong consideration to retaining a fairness statute applicable to public stations, while dropping fairness obligations for commercial licensees. Such a statute might take the form of the aforementioned Public Broadcasting Fairness Act, or Congress could simply retain the fairness language in Section 315 of the Communications Act, and apply it unilaterally to public broadcasting.

The Constitutionality of Fairness

A statute of regulation applying the fairness doctrine solely to noncommercial broadcasting obviously raises constitutional questions. Public broadcasters could challenge the requirement on First Amendment grounds, although, unlike their commercial counterparts, public stations have always seemed content to operate under the strictures of the fairness doctrine. This willingness to accept fairness obligations extended itself to an acceptance of the objectivity and balance provision of the Public Broadcasting Act, which established, at least in principle, a two tiered approach to fairness.

It is more likely that public broadcasters would argue against dual treatment of public and commercial stations, under the equal protection guarantee of the due process clause of the Fifth Amendment. This argument was advanced in a suit brought by the California League of Women Voters, Representative Henry Waxman of California, and the Pacifica Foundation, which successfully challenged the constitutionality of the Public Broadcasting Act's ban on editorializing. For the government to successfully defend a non-content based distinction in a statute effecting First Amendment rights, it would be compelled to prove that its interest promoted by the statute is "substantial," and the statutory classification is "narrowly tailored" to serve that interest.[30]

In examining the justification for continued imposition of the fairness doctrine on public broadcasters, it is useful to individually examine each element of that requirement. It should be remembered that part one of the doctrine requires stations to devote a significant portion of their air time to controversial issues of public importance, while part two mandates balanced coverage

of those issues.

It can be argued that in terms of the fairness doctrine's part one requirement, public broadcasters have a greater obligation to address important public issues than commercial licensees. The public system was conceived with the realization that marketplace considerations generally prevented commercial broadcasters from presenting programming designed for specialized audiences. Thus, public broadcasting would serve as an alternative service, correcting the inevitable failures of the marketplace.

One of the greatest failures of the marketplace lies in the area of in-depth news and public affairs programming. Although the amount of such programming carried by commercial stations and networks has grown substantially during the past few years, even the most respected commercial television news operations remain little more than visual headline services. Even the emergence of alternative distribution services, such as cable and direct broadcast satellite, does not necessarily signify a substantial improvement in television news. For example, while services such as the Cable News Network and the Satellite News Channel have increased the amount of news programming available to the thirty percent of American homes with cable, there is every indication that these "alternative" sources are using traditional commercial news values, such as visualness, conflict and timeliness, in defining the newsworthiness of an event.

Since there is reason to doubt the marketplace's ability to support a television news service which can truly meet the informational needs of the American public, there is ample justification for the government, through public broadcasting, to correct that deficiency. There is also direct precedence for government intervention to correct the marketplace's failure to support informational services, as evidence by public funding of museums, libraries and the public school system.

Admittedly, extending funding support to public broadcasting is something which public officials can be expected to do with little enthusiasm, since they

may very well benefit from an uninformed electorate. But as First Amendment scholars such as Thomas Emerson have recognized, in a country which has chosen self-rule, the government has the responsibility to ensure that the public is informed. Emerson reasoned:

> In a modern democracy, conditions demand that a deliberate affirmative and even aggressive effort be made to support the system of free expression. The natural balance of forces in society today tends to be weighted against individual expression. Only through a positive approach, in which laws and judicial institutions play a leading role, can an effective system be maintained.[31]

Emerson's belief was endorsed by the Supreme Court's decision in a 1976 case involving a challenge to the federal program for public campaign financing. The Court noted that legislation to sustain First Amendment values "is the rule, not the exception."[32] The Court added there were numerous examples of laws designed to provide "fundamental assistance to the exercise of free speech," and cited the Public Broadcasting Act as a prime example.[33]

In his seminal work Government and Mass Media, Zechariah Chafee also argued that the government should assume an affirmative role in facilitating public discussion. Chafee criticized the contention of John Milton and John Stuart Mill that government's only responsibility in promoting free expression was to remove legal impediments, such as prior restraints and seditious libel. Chafee asserted that such a policy was "excessively negative":

> For example, what is the use of telling an unpopular speaker that he will incur no criminal penalities by his proposed address, so long as every hall owner in the city declines to rent him space for his meeting and there are no vacant lots available? There should be municipal auditoriums, school houses out of school hours, . . . parks in summer, all open

> to thresh out every question of public importance, with just as few restrictions as possible; for otherwise the subjects that most need to be discussed will be the very subjects that will be ruled out as unsuitable for discussion.[34]

Since commercial broadcasters--the "hall owners" of the electronic age--continue to limit the presentation of important public issues, there is every reason to add public broadcasting to the list of government-sponsored forums advanced by Chafee.

Before examining the rationale for retaining the second element of the fairness doctrine for public broadcasters, the concerns of those who fear publicly licensed and funded stations will prevent or constrain open public debate should be addressed. As law professor Robert Kammenshine has correctly stated, "participation by the government in the dissemination of political ideas poses a threat to open public debate that is distinct from government impairment of individual expression."[35] While Professor Kammenshine's fears are justified in situations where the government's voice drowns out those who would present an opposing view, they have little relevance to broadcasting, where it is the private licensees who overwhelm the public speaker.

Public broadcasters are also protected from interference by government officials through numerous other factors. For example, no public station is licensed to an agency of the federal government, and CPB is specifically prohibited by the Public Broadcasting Act from functioning as a licensee, program producer or distributor. In the case of state licensed stations, there have been a few documented instances of state officials tampering with the editorial decisions of station management. However, those attempts have not particularly been successful. In one incident involving a public university's television station, a university administrator was able to prevent the broadcast of the PBS docudrama Death of a Princess. His action triggered a lawsuit brought by viewers, who charged that his action constituted government censorship. A

Federal District Court agreed that the administrator's decision violated the First Amendment, however the decision was reversed on appeal.[36] The appellate court's decision notwithstanding, it is possible that the highly visible controversy surrounding the case (and a companion case involving the Alabama Educational Television Commission) may deter similar actions by state officials.

The thrust of the argument for the continued application of part one of the fairness doctrine is grounded in Emerson and Chafee's philosophical approach to the First Amendment, and the government's obligation to foster free expression. There is no case law, nor is there the foreseeable prospect of any, which would support placing a special requirement on public broadcasting to devote substantial coverage to public issues. However, the courts have addressed-albeit somewhat indirectly and tentatively-the issue of public broadcasting's obligation to provide balanced coverage of important public issues.

The first case, Joyner v. Whiting, stemmed from the decision of the president of a state college to suspend the financing of a student newspaper, because the paper opposed the college's integration. A federal court of appeals reversed a lower court ruling, and found the newspaper's editorial position was protected by the First Amendment. In considering the fairness issue, the court stated that "strong arguments" could be established to require a state subsidized paper to present opposing views.[37] The court did not, however, specifically hold that such a balance requirement was mandated.

The second case, Bonner-Lyons v. Boston School Committee, involved the distribution of a notice by the Boston School Committee which advocated opposition to school busing and a racial balance law. A federal court of appeals held that the committee could not distribute the notice "unless fair and reasonable (sic) timely opportunity is afforded for others having differing views to use the same channels . . . ."[38] The court stated:

> it is well settled that once a forum is opened for the expression of views, regardless of how unusual the forum,

> under the dual mandate of the first amendment and the equal protection clause neither the government nor any private censor may pick and choose between those views which may or may not be expressed.[39]

The court's decision in Bonner-Lyons relied heavily on the public forum doctrine which requires that in public places and facilities typically used for public expression, the "government must afford all points of view an equal opportunity to be heard."[40] The doctrine can be traced back to the Supreme Court's 1939 decision in Hague v. CIO.[41] In subsequent decisions, the Court indicated that the government could establish narrow and precise regulations regarding use of public forums, such as requiring persons to obtain a license to parade down a public street. But the Court has emphasized that once a public place is determined to be a public forum, the government cannot limit access to the forum on the basis of what an individual intends to say.

The relevance of Bonner-Lyons to public broadcasting would be unquestioned if public licensees were viewed as public forums. However, in Muir v. Alabama Educational Commission, one of the cases involving Death of a Princess, a three member court of appeals, voting two to one, ruled that the construct was not applicable to public stations. The court held that a public licensee could not operate as a public forum, since a fundamental element of the construct is the public's right of access. The court concluded that right "was fundamentally inconsistent with the responsibilities imposed on broadcasters to service the public interest . . . (since) a public right to demand that particular programs be broadcast would result in excessive and undesirable governmental intrusion."[42]

In his dissenting opinion, Judge Clark strongly challenged the majority's contention that stations licensed to government agencies should enjoy the same editorial discretion as commercial licensees. While the Death of a Princess controversy did not directly involve the balance element of the fairness doctrine, Judge Clark's opinion suggests that public broadcasters should be required to

adhere to the provision:

> My own view is that whenever a state agency supervises broadcast programming, even when it holds the broadcast license, it may not discriminate between points of view on issues of public controversy. . . . A government broadcaster's editorial discretion, must be, to the greatest extent possible, content-neutral.[43]

While the decision of the three judge panel was upheld by the court en banc, it is important to point out that the decision does not necessarily foreclose the possibility of the court's upholding the constitutionality of a fairness obligation applicable only to publicly licensed stations. Ruling that a public licensee is not a public forum only indicates that the stations do not have to provide access to anyone in its audience. Currently, commercial stations operate under the fairness doctrine. Yet the Supreme Court in CBS v. Democratic National Committee refused to apply the public forum doctrine to commercial stations.[44] The Court's decision in CBS and Red Lion shows a concern with access; however, the Court has defined access in terms of the audience's ability to receive a variety of opinions on important issues, rather than the right of all individuals to speak their minds before a station's cameras or microphones.

The rationale for requiring public stations to unilaterally observe a balance requirement may be more philosophical than practical. In reality, the fate of the nation would not be substantially affected,if public stations cound transcend the constraints discussed earlier, and broadcast an official version of the day's events. As already mentioned, public broadcasting's share of the audience is small, and its impact on the American public predictably minimal. However, any move to tolerate the promulgation of an official point of view through a government mass media outlet should be opposed out of an abundance of caution. Law professor Mark Yudof has stated that government speech may pervert the public dialogue by

> indoctrination and the withholding of vital information, thereby undermining the power of the citizenry to judge intelligently and to communicate those judgements. The structure of American constitutional government and underlying historical assumptions about the relationship between the governed and the governors justify an interpretation of the first amendment that encompasses limits on government expression.[45]

While public broadcasting may have little ability to indoctrinate its audience, the public's tolerance for such an attempt might encourage the government to take more effective action toward inculcating society with its dogma.

The argument for balance in government speech cannot and should not be extended to every form it might assume. There is little doubt that neither the constitution nor the public interest is offended every time a government official uses public resources and a public channel to promote a particular point of view. It would not be practical nor especially desirable to require that a public official's every utterance be balanced by an opposing opinion. Such an obligation would severely impair a government's ability to use its resources to positively communicate with the public. Although Professor Yudof recognized the dysfunctional consequences of government speech, he has also acknowledged that such communication can enhance the public's awareness of an issue: "In some cases government may be the only actor with the willingness and resources to present a particular side of a public issue. The majority, as represented by its elected officials, has a right to speak."[46]

While individual government speakers need to retain the right to address issues without incurring a balance obligation, publicly licensed broadcast stations can operate effectively under the prescription. The balance requirement should not embrace a public right of access, but rather provide public stations with discretion in choosing the spokespeople who will offer contrasting views, and deciding the form in which the views will be presented. In short, balance

should retain the definition and evaluative criteria employed by the FCC.

## Conclusion

The previous discussion has been intended to isolate the unique aspects of the public broadcasting-government nexus, which present a rationale for differentiating between commercial and noncommercial licensees when considering the future of the fairness doctrine. The political and constitutional implications of that nexus indicated there is ample reason to strongly argue for the continued application of the fairness doctrine to public broadcasting.

It should be emphasized that this conclusion in no way settles the debate over continuing the fairness doctrine for commercial broadcasters. Clearly, both sides of the fairness debate regarding commercial broadcasting have valid arguments. While an analysis of the controversy was beyond the scope of this paper, future studies should be directed to the issue.

## Notes

[1] Federal Communications Commission, Fairness Doctrine and Public Interest Standards, Fairness Reports Regarding Handling of Public Issues, 39 Fed. Reg. (1974), 26372, 26374.

[2] The amendment to Section 315 stated that broadcasters were obligated to operate "in the public interest, and to afford reasonable opportunity for discussion of conflicting veiws on issues of public importance." Communications Act, Section 315(a) as amended 1959.

[3] It's Your Business, prod. Chamber of Congress of U.S. KMBC-TV, Kansas City, 14 Feb. 1982.

[4] U.S. Cong., House, Subcommittee of the Committee on Interstate and Foreign Commerce, Hearings on H.R. 132, H.R. 5099, H.R. 5536, H.R. 5602, H.R. 645, H.R. 967, H.R. 2910, and S. 205, 87th Cong., 1st sess. (Washington, D.C.: GPO, 1961), p. 62.

[5] U.S. Cong., Senate Committee on Commerce, Report on S. 1160, 90th Cong., 1st sess., S. Rept. 222 (Washington, D.C.: GPO, 1967), p. 7.

[6] Cong. Rec., 19 Oct. 1967, p. 29385.

[7] H. Rept. 572, p. 20.

[8] "Memorandum of the Federal Communications Commission as Amicus Curiae," Educational Broadcasting Review , 4 No. 4 (Aug. 1970), 11.

[9] "Memorandum," p. 12.

[10] "Memorandum," p. 12.

[11] State of Maine v. Univ. of Maine, 266 A.2d 868 (Me. 1970).

[12] State of Maine v. Univ. of Maine, 266 A.2d 868.

[13] Los Angeles United School District, 30 FCC 2d 551 (1971).

[14] Federal Communications Commission, Letter to WHPR, 8310K, C6-1041 (1971), p. 3.

[15] In Re Complaint by Accuracy in Media on Behalf of Marilyn Desaulniers, 39 FCC 2d 418 (1973).

[16] Public Bradcasting Act, Public Law 90-129 Section 398 (1967).

[17] Marilyn Desaulniers, 39 FCC 2d 421 (1973).

[18] In Re Complaining on Behalf of Marilyn Desaulniers Concerning Fairness Doctrine Re Public Broadcasting Service, 43 FCC 2d 855 (1973).

[19] Accuracy in Media v. Federal Communications Commission 521 F.2d 289 (D.C. Cir. 1975).

[20] Accuracy in Media v. Federal Communications Commission F.2d 296.

[21] Accuracy in Media v. Federal Communications Commission F.2d 296.

[22] Cong. Rec., 21 Sept. 1967, p. 26391

[23] National Association of Educational Broadcasters, The Nixon Administration Public Broadcasting Papers: A Summary 1969-1974,(Washington, D.C., 1979), p. 9.

[24] Republican Study Committee, "Public Broadcasting and the Reagan Budget," Mimeo, Washington, 1 May 1981, p. 4.

[25] Erwin G. Krasnow, Lawrence D. Longley, and Herbert A. Terry, The Politics of Broadcast Regulation, 3rd ed. (New York: St. Martin's Press, 1982), p. 53.

[26] Robert MacNeil, The People Machine: The Influence of Television on American Politics (New York: Harper and Row, 1968), p. 243.

[27] "In Brief," Broadcasting, 22 Mar. 1982, p. 112.

[28] "Reagan Supports First Amendment Rights For Broadcasters," Broadcasting, 12 Apr. 1982, p. 31.

[29] Mark S. Fowler and Daniel L. Brenner, "A Marketplace Approach to Broadcast Regulation," Texas Law Review, 60, No. 2 (Feb. 1982), mimeo, 48.

[30] Police Department of Chicago v. Mosley, 408 U.S. 92, 99, 101 (1972).

[31] Thomas Emerson, "Toward a General Theory of the First Amendment," Yale Law Journal, 72 (1963), 955.

[32] Buckley v. Valeo, 424 U.S. 93 n. 127 (1976).

[33] Buckley v. Valeo, 424 U.S. 93 n. 127 (1976).

[34] Zechariah Chafee Jr., Government and Mass Communications, Vol 2 (Chicago: Univ. of Chicago Press, 1947), pp. 471-472.

[35] Robert D. Kammenshine, "The First Amendment's Implied Political Establishment Clause," California Law Review, 67, No. 5 (Sept. 1979), 1104.

[36] Muir v. Alabama Educational Television Commission, slip op 15733 (5th Cir. 1982).

[37] Joyner v. Whiting, 477 F 3d 462 (1973).

[38] Bonner-Lyons v. School Committee, 480 F.2d 444 (1973).

[39] Bonner-Lyons v. School Committee, 480 F.2d 443, 444 (1973).

[40] Police Department of Chicago v. Mosley, 408 U.S. 96 (1972).

[41] Hague v. CIO, 307 U.S. 515 (1939).

[42] Muir v. Alabama Educational Television Commission, 7 Med. L. Reptr. 1939, 1940,(1981).

[43] Muir v. Alabama Educational Television Commission, 7 Med. L. Reptr, 1945, 1947, (1981).

[44] Columbia Broadcasting System V. Democratic National Committee 412 U.S. 94 (1973).

[45] Mark Yudof, "When Government Speaks," Texas Law Review, 57, No. 6 (Aug. 1979), 898.

[46] Yudof, "When Government Speaks," 868, 869.